

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL GEORGE SMITH,

Defendant-Appellant.

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UNPUBLISHED

March 10, 2005

No. 251381

Jackson Circuit Court

LC No. 03-000356-FH

Before: Fort Hood, P.J., and Griffin and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for second-degree criminal sexual conduct. MCL 750.520c. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that he is entitled to resentencing where the trial court exceeded the sentencing guidelines range without a valid substantial and compelling reason. The trial court stated that it was exceeding the guidelines because they did not account for the fact that the victim was three years' old and because of defendant's lack of remorse.

A sentencing court may depart from the appropriate sentence range established under the sentencing guidelines if the court has a substantial and compelling reason for the departure, and states the reason on the record. MCL 769.34(3). The court shall not base a departure on a characteristic already taken into account in determining the appropriate sentencing range unless the court finds from the facts contained in the record that the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b). The existence of a particular factor is a factual determination reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). The determination that a factor is objective and verifiable is reviewed as a matter of law. *Id.* The determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for abuse of discretion. *Id.* at 265.

While the guidelines do score for exploiting a victim's vulnerability, they do not account for the extreme youth of the victim in this case. Where the victim was three years' old, the court could find that her youth was a legitimate factor that was not considered by the guidelines. *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001). The guidelines factor

for psychological injury does not account for the effect on the victim from having to learn about sexual matters at such a young age. *Id.*

While lack of remorse may be a subjective matter, here there was an objective basis for that finding. Defendant made a confession to police, in which he admitted that he touched the victim's vagina with his penis. At trial, defendant testified that he never had any sexual contact with the victim. The trial court observed that defendant's feeling that he did not do anything wrong would make him extremely difficult to supervise on probation. At sentencing a trial court may properly consider lack of remorse where it concerns defendant's prospects for rehabilitation. *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987). Lack of remorse can be a substantial and compelling reason for a departure from the guidelines. In this situation, defendant's lack of remorse was an objective factor that provided a substantial and compelling reason for departing from the guidelines, and the trial court did not abuse its discretion in exceeding the sentencing guidelines. *Babcock, supra*.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Richard Allen Griffin  
/s/ Pat M. Donofrio